

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Appeals for
the Federal Circuit and the United
States Court of International Trade

Vol. 24

AUGUST 29, 1990

No. 35

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The decisions, rulings, notices, and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

U.S. Customs Service

General Notice

NOTICE OF FURTHER DISSEMINATION OF EXISTING INFORMATION PRODUCT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The U.S. Customs Service provides rulings on a variety of subjects for the guidance of the importing public. These rulings have been available in the past in a variety of formats. This document advises the public of the availability of certain Customs rulings in an additional format. Dissemination of the Customs rulings in this additional format, floppy disks, shall not constitute publication for purposes of Part 177, Customs Regulations (19 CFR Part 177).

DATE: The rulings in a new automated format will be available September 20, 1990.

FOR FURTHER INFORMATION CONTACT: Howard Plofker or Karl Means, General Classification Branch, (202) 566-8181.

SUPPLEMENTARY INFORMATION:

The U.S. Customs Service has, pursuant to section 103.4, Customs Regulations (19 CFR 103.4), made compilations of its rulings available to the importing community. These rulings have been available in microfiche and handbook formats, on a subscription basis. They have also been available to subscribers to LEXIS, a legal information retrieval system operated by Mead Data Central, Inc., as the result of a pilot project between Customs and that company.

In light of advancements in Customs automated capabilities, including advancements in the Customs Automated Commercial System (ACS), we are now able to make rulings in the following subject areas available in an automated format:

1. Bonds;
2. Carriers;
3. Classification;
4. Drawback;
5. Entry/Liquidation;
6. Marking;

7. Quota;
8. Restricted Merchandise;
9. Trademark, Copyright and Patent;
10. Valuation; and
11. Other.

These rulings will be contained in 2 separate data bases, one covering rulings issued by Customs Headquarters and another covering rulings issued by the Customs N.Y. Seaport Area Office or by district directors pursuant to the Customs District Rulings Program. Only the rulings issued by the Headquarters office will be available for subscription at this time. The opening of separate subscriptions for the New York rulings will be announced when that data base is available. We anticipate that both of these data bases will be available for use in the Customs public reading rooms noted in section 103.1, Customs Regulations (19 CFR 103.1), as budgetary resources permit.

The rulings will be available on both 5 $\frac{1}{4}$ " and 3 $\frac{1}{2}$ " double sided/ double density floppy disks. The text files contained therein will be indexed (noncumulative) and will be in a compressed form in order to permit the storage of a greater quantity of files than may normally be stored on such disks. Instructions on how to use the disks as well as a computer software program to permit the reconstructing or extraction of these files in an uncompressed form will be furnished, without charge, to subscribers. In order to use these floppy disks subscribers will need a computer, with a hard disk, capable of utilizing the MS-DOS operating system, and a commercially available text database retrieval software package suitable for their needs.

We anticipate that the initial distribution of the ruling disks will be about 30 days after publication of this notice and that they will be issued on a semimonthly basis thereafter. Although each disk will not be cumulative and will normally cover only rulings issued during the prior two week period, the first shipment to subscribers will include all rulings issued since January 1, 1989, as well as some rulings issued prior thereto, which are on the automated system. It is anticipated that this first shipment will contain approximately 2000 rulings. Additional rulings, including some issued before the above date, will be included on the disk covering the period when they are entered into the automated system.

The initial annual subscription fee will be \$280 (domestic); \$350 (foreign). It will cover rulings issued through September 30, 1990. Thereafter, subscriptions will be on an October 1-September 30 annual basis, at a fee to be annually determined. A notice of the annual fee will be published in the CUSTOMS BULLETIN.

Persons interested in subscribing should send their request, with a check or money order, made payable to the U.S. Customs Service, for \$280 (\$350 foreign) to:

Chief, Legal Reference Staff
Office of Regulations and Rulings
U.S. Customs Service
1301 Constitution Ave., NW, Room 2321
Washington, D.C. 20229

The order should include the following typed or printed information:

1. Company or personal name;
2. Additional address/attention line;
3. Street address;
4. City, State, ZIP code;
5. Daytime phone, including area code; and
6. Disk size—5 $\frac{1}{4}$ " or 3 $\frac{1}{2}$ ".

CAROL HALLETT,
Commissioner of Customs.

Approved: July 18, 1990.

PETER K. NUNEZ,

Assistant Secretary of the Treasury.

[Published in the Federal Register, August 21, 1990 (55 FR 34114)]



U.S. Customs Service

Proposed Rulemaking

19 Part 10

PROPOSED CUSTOMS REGULATIONS AMENDMENT REGARDING ENFORCEMENT OF THE AUTOMOTIVE PRODUCTS TRADE ACT; EXTENSION OF TIME FOR COMMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Extension of time for comments.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the proposed amendment to the Customs Regulations regarding enforcement of the Automotive Products Trade Act. A notice inviting public comment on the proposal was published in the Federal Register on June 18, 1990 (55 FR 24582), and comments were to have been received on or before August 17, 1990. A request has been received to extend the comment period and accept comments for a period of 60 additional days. The request points out that the issue and subject matter are complex and that the current deadline falls during an exceptionally busy period for members of the automobile industry whose expertise is needed to prepare a responsive comment.

The additional comment period will provide an opportunity for organizational and individual comment. In view of the arguments presented, the request is granted.

DATE: Comments will be accepted if received on or before October 16, 1990.

ADDRESS: Comments (preferably in triplicate) should be submitted to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Legal Matters: James Seal, General Classification Branch, (202) 566-8181;

Operational and CFTA Matters: Maria Reba, Office of Trade Operations, (202) 566-7060;

Audit Matters: Eugene Sheskin, Office of Regulatory Audit, (202) 566-2812.

Dated: August 10, 1990.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, August 15, 1990 (55 FR 33325)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo

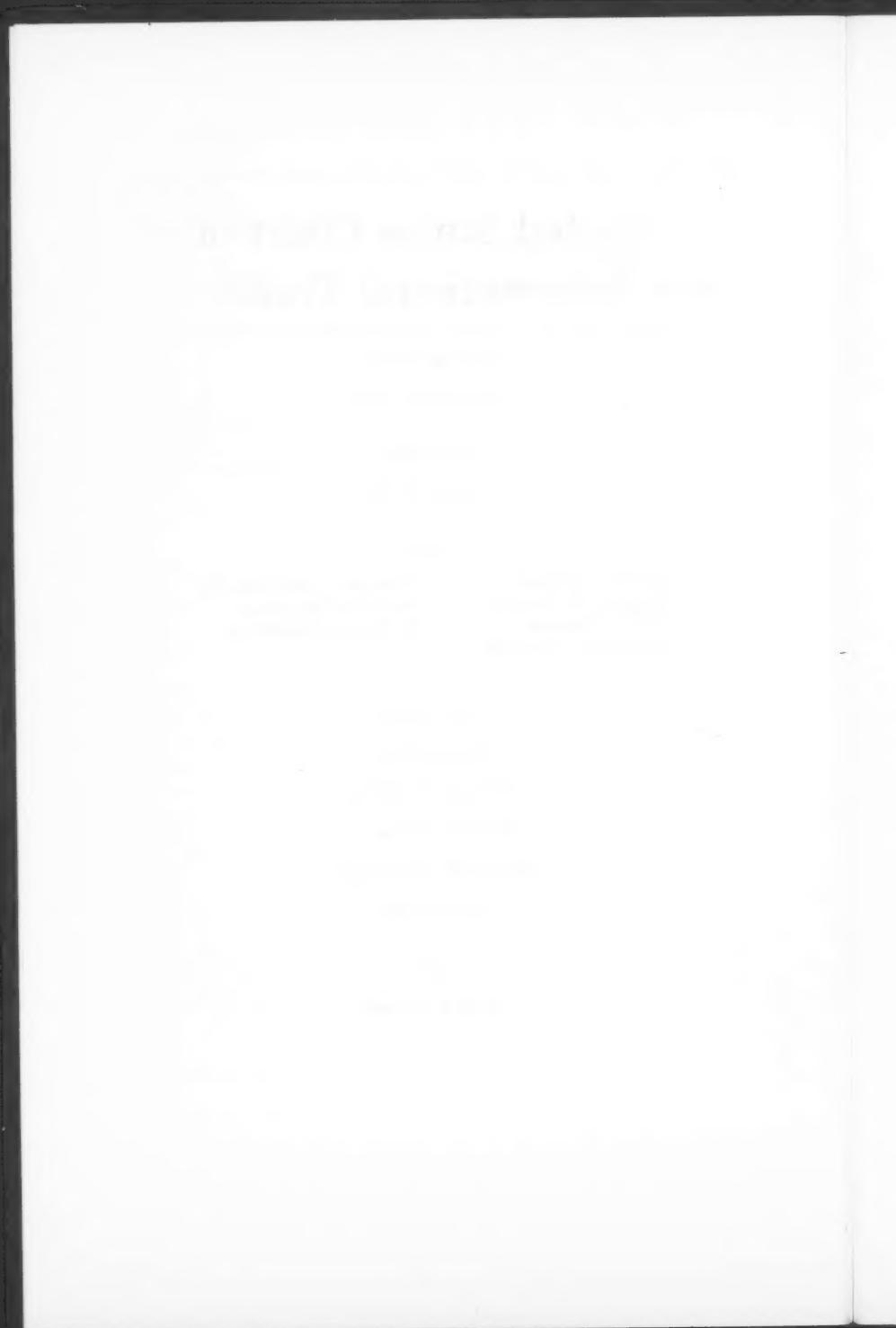
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
Nils A. Boe

Clerk

Joseph E. Lombardi



Decisions of the United States Court of International Trade

(Slip Op. 90-70)

A. HIRSH, INC., PLAINTIFF v. UNITED STATES, DEFENDANT, AND PAINT
APPLICATORS TRADE ACTION COALITION (PATAC), DEFENDANT-INTERVENOR

Court No. 89-06-00366

[Applicant's Motion for Equal Access to Justice Act Fees Denied.]

(Decided July 26, 1990)

Susman & Associates (Barbara A. Susman) for plaintiff.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Assistant General Counsel
(*George Thompson*), United States International Trade Commission for defendant.

Miller, Canfield, Paddock and Stone (Charles R. Johnston, Jr. and Doreen M. Edelman) for defendant-intervenor.

OPINION AND ORDER

RESTANI, Judge: Pursuant to Rule 68 of this court, counsel for A. Hirsh, Inc. (applicant) has applied for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA).¹ The government responds that applicant was not entitled to fees as it was not a prevailing party under the terms of the statute; and that, even if the court found that applicant were a prevailing party, the government's position was substantially justified.²

The applicant had challenged the United States International Trade Commission's (ITC) determination summarily denying applicant's request for 19 U.S.C. § 1675(b) (1988) review, based on changed circumstances, of a prior affirmative determination under 19 U.S.C. § 1673(b) (1988). In its first opinion in the matter, the court remanded the case to ITC for an expression of the reasons for its denial of applicant's § 1675(b) petition. *See A. Hirsh, Inc. v. Unit-*

¹Applicant has also sought fees and sanctions under CIT Rules 8, 11, and 68 against defendant-intervenor, the Paint Applicators Trade Action Coalition, and some of its individual members, with regard to motions to intervene. The court has reviewed the documents related to this application, and finds no basis in law or fact to grant it. Defendant-intervenor was permitted to intervene as of right in the main action. See Order of October 16, 1989. Plaintiff's motion opposing intervention was denied as moot on October 27, 1989. The individuals' request to intervene was withdrawn. As to the individuals there has been insufficient explanation or segregation of the request, which would appear ill-founded in any case.

²Plaintiff also states that fees should be awarded against the United States under Rule 11, although this request is not supported. Presumably the plaintiff contends defendant lacked a good faith argument and acted frivolously in not conceding that reasons for ITC's determination should have been published. This was a case of first impression as to whether reasons for denying a changed circumstances investigation need be formally stated. The statute was not explicit on this point. Thus, Rule 11 sanctions do not appear appropriate. The court does not reach the issue of substantial justification under the EAJA.

ed States, 14 CIT —, 729 F. Supp. 1360, 1365 (1990) (*Hirsh I*). The court expressed no opinion as to the merits of applicant's claim. *Id.*

Following submission of ITC's reasons for its dismissal of applicant's petition for § 1675(b) review, the court concluded that "ITC's determination reflect[ed] adequately its consideration of plaintiff's contentions." *A. Hirsh, Inc. v. United States*, Slip. Op. 90-045, at 9 (May 9, 1990) (*Hirsh II*). Thus, the record here indicates that, despite an interim remand by the court on an independent procedural issue, applicant did not prevail on the merits of its claims.

Under the EAJA, attorney's fees may be awarded against the United States in certain circumstances, but only to a "prevailing party." 28 U.S.C. § 2412(d)(1)(A). The determination of whether an applicant is a "prevailing party" depends on whether the applicant has achieved "'some of the benefit [it] sought in bringing the suit.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978).³ See also *Comm'r INS v. Jean*, 110 S.Ct. 2316, 2320 (1990) (Under the EAJA "the Court first must determine if the applicant is a 'prevailing party' by evaluating the degree of success obtained."). In determining whether the applicant has obtained a measure of success, the court must "'focus on the precise factual/legal condition that the fee claimant has sought to change, and then determine if the outcome confers an actual benefit or release from burden.'" *Nat'l Coalition Against Misuse of Pesticides v. Thomas*, 828 F.2d 42, 44 (D.C. Cir. 1987) (quoting *Grano v. Barry*, 783 F.2d 1104, 1108-09 (D.C. Cir. 1986)). Thus, an interim victory on an issue which results in remand but does not lead to the ultimate vindication of applicant's claim or claims ordinarily will not form the basis for a fee award. *Austin v. Dept. of Commerce*, 742 F.2d 1417, 1420-21 (Fed. Cir. 1984). See also *McGill, supra*, 712 F.2d at 31-32.

Applicant has not met the threshold requirement for award of EAJA fees. An examination of plaintiff's filings and arguments before the court show that applicant's primary interest in the litigation was to obtain a review, and ultimately reversal, of an earlier ITC administrative determination. The court's decision in *Hirsh I* was not based on the merits of applicant's petition. Rather, the court found that ITC had acted contrary to law by not articulating reasons for its denial of applicant's petition. The court therefore remanded the case so that it could ascertain the basis for the denial. Once ITC's reasons were articulated, the court affirmed ITC's denial.

³Congress intended the definition of "prevailing party" under the EAJA to be consistent with use of that term in other fee shifting statutes. *McGill v. Sect. of Health and Human Services*, 712 F.2d 28, 30 (2d Cir. 1983), cert. denied, *sub nom. McGill v. Heckler*, 466 U.S. 1068 (1984). Cf. *Hensley, supra*, 461 U.S. at 433 n.7.

(Slip Op. 90-71)

TOHO TITANIUM CO., LTD., PLAINTIFF v. UNITED STATES, DEFENDANT, AND
RMI CO., DEFENDANT-INTERVENOR

Court No. 89-05-00248

[Judgment for defendant; action dismissed.]

(Decided July 30, 1990)

Graham & James (Patrick Fields, Yasuhiro Hagihara, and Denis H. Ovakawa), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Vanessa P. Sciarra*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Tina M. Stikas*), for defendant.

Wilmer, Cutler & Pickering (John D. Greenwald and Stavros J. Lambrinidis) for defendant-intervenor.

DiCARLO, Judge: Toho Titanium Co., Ltd. (Toho), a Japanese titanium manufacturer, moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record in its challenge to the final results of an administrative review of an antidumping order on titanium sponge from Japan. *Titanium Sponge from Japan; Final Results of Antidumping Duty Administrative Review and Tentative Determination to Revoke in Part*, 54 Fed. Reg. 13,403 (Apr. 3, 1989). The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) (1988) and 28 U.S.C. § 1581(c) (1988).

Toho contests the date of sale established by the United States Department of Commerce, International Trade Administration for one sale, and requests an order that Commerce recalculate the dumping margin. The Court finds that Commerce did not abuse its discretion in establishing the date of sale and that its determination is supported by substantial evidence and is in accordance with law. Toho's motion for judgment on the agency record is denied.

BACKGROUND

On April 4, 1985, Toho entered into a three-year contract, which obligated its U.S. customer to purchase at a fixed price a specified minimum quantity of titanium sponge annually. The contract permitted the customer to order additional titanium sponge up to a stated maximum quantity at the same price. Conf. R. 6, Supp. Ex. 1 at 5-6. The contractual rights and duties between Toho and its customer were governed by California law.

In December 1986, Commerce initiated an administrative review of an antidumping order on Japanese titanium sponge. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 51 Fed. Reg. 45,364 (1986). In order to compare United States price (USP) and Foreign Market Value and set the rate for converting yen into dollars, Commerce determined that the date of sale for the minimum quantity specified in the contract, was April 4, 1985, the contract date. Once during the review period, Toho's customer or-

dered quantities above the minimum amount. Although, the price of this order was set in the April 4 contract, Commerce determined the date of sale for that order to be January 15, 1986, the purchase order date. Commerce found this later date to be the proper time of sale for quantities above the minimum stated in the contract because the customer was not committed to purchase the additional amount until it issued delivery instructions to Toho. 54 Fed. Reg. at 13,404.

In the interval between the date of the contract and the purchase order, the yen appreciated substantially. R. 45 at 56. This resulted in the calculation of a higher foreign-market value for Toho and an increased dumping margin of 0.83 percent. 54 Fed. Reg. at 13,406.

Toho argues that Commerce erred in setting the sales date for the additional quantities of titanium sponge as of the date of the purchase order rather than the date of the contract because: (1) Commerce improperly departed from its prior administrative practice and precedent; (2) the decision was not in accordance with California contract law; and (3) Toho was unreasonably and unfairly penalized for exchange-rate fluctuations which were beyond its control.

DISCUSSION

I. Commerce Policy and Practice:

To ascertain whether sales in the United States are at less than fair value, Commerce compares USP with Foreign Market Value of the imported merchandise as of the same date. 19 U.S.C. §§ 1677a, 1677b(a) (1988). In order to establish the appropriate date for comparison, Commerce must determine the date when a sale has taken place. *See Mitsubishi Elec. Corp. v. United States*, 12 CIT —, 700 F. Supp. 538, 561 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990); 19 U.S.C. §§ 1677a, 1677b(a) (1988). Commerce also uses the exchange rate on that date for converting foreign currency. 19 C.F.R. §§ 353.56 (1986).

Neither the statute nor the regulations define when exported merchandise is sold in the United States in terms of the time or date a sale is consummated. *Mitsubishi*, 12 CIT at —, 700 F. Supp. at 561. According to Commerce's practice, a sale is complete within the meaning of the statute when the essential terms of the transaction, including price, are set. *See id.* at —, 700 F. Supp. at 561; *Atlantic Steel Co. v. United States*, 10 CIT 340, 343, 636 F. Supp. 917, 920 (1986).

Toho alleges that Commerce impermissibly deviated from this practice without reasonable justification when it set the date of sale for the additional quantities of titanium sponge as of the purchase order date of January 15, 1986. Toho claims that all essential terms of the sale were fixed as of the date of the contract on April 4, 1985, and that Commerce failed to give proper consideration to the pric-

ing term in the sales contract, which irrevocably set the price as of that date.

In addition to price, Commerce considers quantity to be an essential term in establishing when a sale has occurred. *See Brass Sheet and Strip From France*, 52 Fed. Reg. 813, 814 (1987); *Certain Forged Steel Crankshafts from the Federal Republic of Germany*, 52 Fed. Reg. 28,170, 28,175 (1987); *64K Dynamic Random Access Memory Components (64K DRAM's) From Japan*, 51 Fed. Reg. 15,943, 15,953 (1986); *Erasable Programmable Read Only Memories (EPROMs) From Japan*, 51 Fed. Reg. 39,680, 39,681 (1986); *Cellular Mobile Telephones and Subassemblies From Japan*, 50 Fed. Reg. 45,477, 45,456 (1985). When an essential term in a sales contract is indefinite, Commerce's practice is to treat the contract as the point of sale only when the indefinite term will be set by some mechanism or formula outside of the parties' control. *See, e.g., Voss Int'l Corp. v. United States*, 67 CCPA 96, 105-06, C.A.D. 1253, 628 F.2d 1328, 1334-35 (1980) (use of exchange rate to set price in a sales contract was a mechanism outside the parties' control); *see also Brass Sheet and Strip From France*, 52 Fed. Reg. at 814; *Offshore Platform Jackets and Piles From Japan*, 51 Fed. Reg. 11,788, 11,793-94 (1986); *Cellular Mobile Telephones and Subassemblies From Japan*, 50 Fed. Reg. at 45,456.

Toho argues that Commerce's date-of-sale determination is inconsistent with Commerce's determination in *Brass Sheet and Strip From France*, 52 Fed. Reg. 812 (1987) and *Offshore Platform Jackets and Piles From Japan*, 51 Fed. Reg. 11,788 (1986). Toho claims that in those cases, Commerce set the date of sale as the date of the respective sales contract even though the customer had the discretion subsequently to set certain terms. These determinations are, however, distinguishable. In *Brass Sheet and Strip*, the metal value component of price was set "prior to shipment based on publicly quoted sources as of a date chosen by the customer during a period specified in the contract." 52 Fed. Reg. at 814. Commerce found that the price term was nonetheless fixed as of the contract date because metal value:

will be established prior to shipment based on publicly quoted sources as of a date chosen by the customer during a period specified in the contract. Because the publicly quoted metal value sources were established as the sole source of the metal value, and because the parties agreed on the time period during which the customer could lock in the publicly quoted metal value, no further negotiations were necessary between the parties to determine the price.

Id.

Similarly, in *Offshore Platform Jackets*, Commerce stated that a contract term providing that the customer could submit change orders

established certain formulae for the determination of the amount of these change orders, including unit costs of materials and equipment, as well as labor costs. At the time the contract was issued, the price of the contract was "determinable" in the sense that there was basically nothing more on which the parties to the contract needed to agree.

51 Fed. Reg. at 11,793-94. In both cases, Commerce found that the indefinite contract terms were set by some mechanism or formula outside of the parties' control.

In this determination, Commerce found that:

On the execution date of the contract, * * * the customer had not yet agreed to purchase any quantities above the minimum and * * * the decision as to whether to order any titanium sponge above the minimum was totally left to the customer's discretion and, thus, was not determined by factors outside of the parties' control.

54 Fed. Reg. at 13,404. Thus, Commerce concluded that while the price term in the Toho sales contract was fixed, the quantity term was insufficiently established to determine that the additional quantities ordered were sold as of the date of the sales contract.

The contract bound Toho to deliver all quantities up to the stated maximum at the specified price. Had market price fallen, however, the customer was not precluded from renegotiating the contract price with Toho for quantities above the minimum stated in the contract or filling its requirements by purchasing on the open market. The purchase of additional quantities under the contract was solely within the customer's discretion and not set by some objective standard. Under these circumstances, Commerce could, within its discretion, find that the quantity term was indefinite and set the date of sale when the customer issued its delivery instructions to Toho. The Court holds that Commerce's finding is consistent with past administrative practice, is supported by substantial evidence, and is in accordance with law.

II. *State Contract Law:*

Toho argues that because the sales contract was a valid, binding, and enforceable obligation under California law as of April 4, 1985, the date of sale for all quantities purchased in the United States was the date of that agreement. It claims that "[i]n the absence of express statutory or regulatory authority, [Commerce's] established practice has been to look to state contract law to resolve 'date of sale' questions." Toho Memorandum at 16 (citing *Brass Sheet and Strip From France*, 52 Fed. Reg. at 814; *64 Dynamic Random Access Memory Components (64K DRAM's) From Japan*, 51 Fed. Reg. at 15,947; *Cellular Mobile Telephones and Subassemblies From Japan*, 50 Fed. Reg. at 45,456).

None of the cited determinations refer to state law. Rather, they refer to general principles of contract law contained in treatises and the Uniform Commercial Code (UCC) in support of Commerce's policy that the basic terms governing quantity and price determine the definition of a sale.

Toho further claims that Commerce's bifurcated date-of-sale determination treated the agreement as two separate contracts. Toho alleges such treatment is contrary to California contract law because there is no evidence that the parties intended the contract to be severable. Toho asserts that assuming the portion of the agreement to purchase additional quantities was a separate option contract, under California law the exercise of an option relates back to the date the option was granted for the purpose of determining when the sale was made.

The court has previously held that the UCC does not control Commerce's methodology in determining what constitutes a sale. *Atlantic Steel*, 10 CIT at 343, 636 F. Supp. at 920. This holding is equally compelling with respect to state contract law in determining date of sale under the trade laws of the United States. The phrase "date of sale" must be defined in a manner consistent with the purposes and principles underlying the trade laws. A contract enforceable under state law may be insufficiently definite under the trade laws for Commerce to conclude that a sale has occurred as of the date of the agreement. While Commerce is not precluded from referring to state contract law or general contract principles, it is not required to do so.

Moreover, requiring Commerce to make its determination according to state contract law would result in the application of different methodologies dependent entirely upon the particular state law governing a contract. Such practice would be inconsistent with the uniform administration of the antidumping law.

At oral argument, Toho asserted that it would be better policy for Commerce to look to state law to determine when a sale has been made. The Supreme Court has stated that

federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of *** policy choices and resolving the struggle between competing views of the public interest are not judicial ones.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866, *reh'g denied*, 468 U.S. 1227 (1984). Therefore, where Commerce is confronted with several policy options, the Court will not substitute its judgment for that of the agency.

III. Exchange-Rate Changes:

Toho argues that because it had no legal right to alter its price or refuse to ship any additional quantities ordered, Commerce's date-of-sale determination for the additional quantities unfairly and un-

reasonably penalized Toho for intervening changes in the exchange rate which were beyond its control. Toho states the sales contract was a long-term contract. Plaintiff's Reply to Oppositions of Defendant United States and Defendant-Intervenor RMI Company to Plaintiff's Motion for Judgment upon Agency Record, at 2.

The Court is unpersuaded that Toho is being penalized for events outside its control. A Commerce regulation provides:

For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates.

19 C.F.R. § 353.56(b) (1988) (renumbered 19 C.F.R. § 353.60(b) (1989)). Under another regulation, Commerce will not take into account changes in exchange rates "[w]here prices under consideration are affected by *temporary exchange rate fluctuations* * * *." 19 C.F.R. § 353.56(b) (1988) (emphasis added). Thus, it is incumbent on a party to a long-term contract to take into account changes in exchange rates when setting its prices. *See Melamine Chems., Inc. v. United States*, 2 Fed. Cir. (T) 57, 65, 732 F.2d 924, 931 (1984).

Toho chose to enter into a three-year sales contract that, by setting fixed prices, did not adequately provide for changes in the value of the yen. Therefore, Toho bore the risk both that the yen would appreciate in the ten-month period between the contract and the purchase order for additional quantities of titanium sponge, and that this appreciation could lead to a higher dumping margin.

CONCLUSION

The Court holds that Commerce did not abuse its discretion in establishing the date of sale and that its determination is supported by substantial evidence and is in accordance with law. Accordingly, Toho's motion for judgment on the agency record is denied. This action is dismissed.

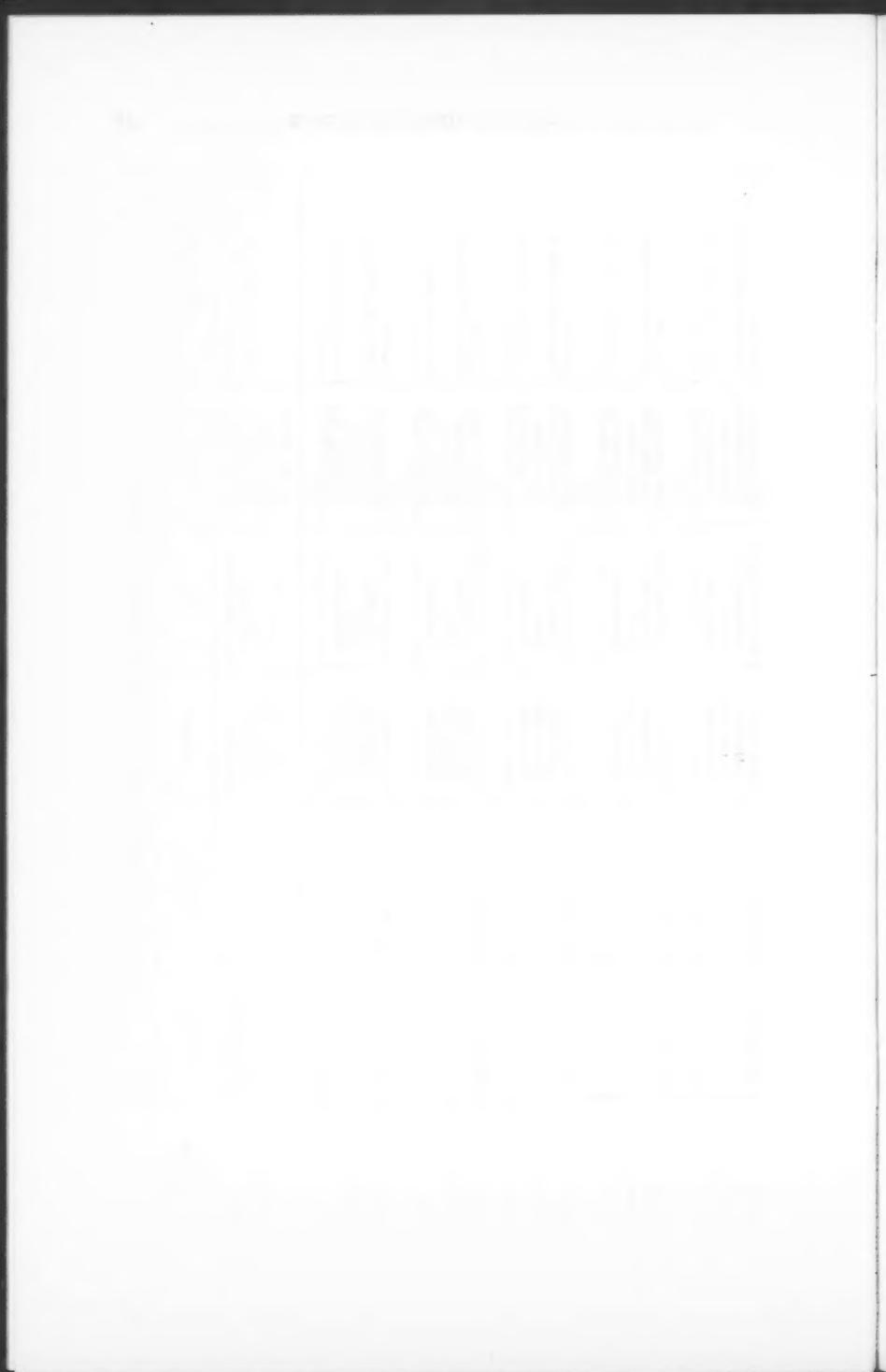
ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE/JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
CB0/222 7/26/90 Aquillino, J.	I.D. Enterprises, Inc.	86-9-01176	716.1870, 720.28, 720.34 Various rates	688.43, 4.7%	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989)	Los Angeles Quarts analog watches and watch movements
CB0/223 7/26/90 Aquillino, J.	I.D. Enterprises, Inc.	86-3-00266	716.1870, 720.28, 720.34 Various rates	688.43, 4.5%	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989)	Los Angeles Quarts analog watches and watch movements
CB0/224 7/26/90 Aquillino, J.	I.D. Enterprises, Inc.	86-4-00284	716.1870, 720.28, 720.34 Various rates	688.43, 4.5%	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989)	Los Angeles Quarts analog watches and watch movements
CB0/225 7/26/90 Aquillino, J.	Bradley Time Div.	86-3-00317	716.05, 716.09-716.45 or 716.15 Various rates	688.43 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989)	New York Quarts analog watches or clocks
CB0/226 7/26/90 Re, C.J.	Pathon/H.I.M., Inc.	87-11-01127	378.30 or 380.40 Various rates	A738.30 or A380.40 Free of duty	Agreed statement of facts	Tampa Website
CB0/227 7/26/90 Re, C.J.	Kanboi Industries	84-4-00580	700.95 or 700.85, 12.5%	700.35, 10%	Mitsubishi Int'l Corp. v. U.S., 11 CIT 928 (1987)	Norfolk Footwear
CB0/228 7/26/90 Aquillino, J.	Madison Watch Co.	83-8-01226	716.09-716.45, 718.05, 740.34, 740.35, 774.85 or 791.54, 713.15 Various rates	688.40, 688.45, 688.43, or 688.42 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989)	New York Quarts analog watches, etc.
CB0/229 7/26/90 Re, C.J.	Nishio Iwai American Corp.	84-2-00166	700.95, 12.5%	700.45, Various rates	Mitsubishi Int'l Corp. v. U.S., 11 CIT 928 (1987)	Los Angeles Footwear
CB0/230 7/26/90 Re, C.J.	Nishio Iwai American Corp.	84-5-00614	700.95, 12.5%	700.35, Various rates	Mitsubishi Int'l Corp. v. U.S., 11 CIT 928 (1987)	Los Angeles Footwear
CB0/231 7/26/90 Re, C.J.	Nishio Iwai American Corp.	85-5-00690	700.95, 12.5%	700.45, 10%	Mitsubishi Int'l Corp. v. U.S., 11 CIT 928 (1987)	Portland Footwear

ABSTRACTED CLASSIFICATION DECISIONS — Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	POINT OF ENTRY AND MERCHANDISE
CB0/232 7/27/90 Aquilino, J.	Bar-Zai Exports Inc.	84-12-01771	716.09-716.45, 720.10-720.18, 716.06 or 716.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.30	Belcent Sales Corp. v. U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. v. U.S. 673 F.2d 1376 (1982)	New York Quartz analog watches, etc.
CB0/233 7/27/90 Aquilino, J.	Ballarino Int'l, Ltd.	84-1-00127	716.09-716.45, 720.10-720.18, 716.06 or 716.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.30	Belcent Sales Corp. v. U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. v. U.S. 673 F.2d 1376 (1982)	New York Quartz analog watches, etc.
CB0/234 7/27/90 Aquilino, J.	Ballarino Int'l, Ltd.	84-11-01670	716.09-716.45, 720.10-720.18, 716.06 or 716.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.30	Belcent Sales Corp. v. U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. v. U.S. 673 F.2d 1376 (1982)	New York Quartz analog watches, etc.
CB0/235 7/27/90 Aquilino, J.	Blue Spot, Inc.	84-1-00126	716.09-716.45, 720.10-720.18, 716.06 or 716.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.30	Belcent Sales Corp. v. U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. v. U.S. 673 F.2d 1376 (1982)	New York Quartz analog watches, etc.
CB0/236 7/27/90 Aquilino, J.	Blue Spot, Inc.	84-8-01119	716.09-716.45, 720.10-720.18, 716.06 or 716.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.30	Belcent Sales Corp. v. U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. v. U.S. 673 F.2d 1376 (1982)	New York Quartz analog watches, etc.
CB0/237 7/27/90 Aquilino, J.	Blue Spot, Inc.	87-1-00053	716.09-716.45, 720.10-720.18, 716.06 or 716.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.30	Belcent Sales Corp. v. U.S. 878 F.2d 1413 (1989) or Texas Instruments, Inc. v. U.S. 673 F.2d 1376 (1982)	New York Quartz analog watches, etc.

C90/288 7/27/90 Aquillino, J.	Blue Spot, Inc. 88-2-001160	718.06-718.45, 720.10-720.18, 715.06 or 715.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.20 Various rates	Balfont Sales Corp. v. Quarts analing watches, etc. Instruments, Inc. v. U.S. 673 F.2d 1413 (1982)
C90/289 7/27/90 Aquillino, J.	Blue Spot, Inc. 88-7-000003	718.06-718.45, 720.10-720.18, 715.06 or 715.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.20 Various rates	Balfont Sales Corp. v. Quarts analing watches, etc. Instruments, Inc. v. U.S. 673 F.2d 1413 (1982)
C90/240 7/27/90 Aquillino, J.	Casio, Inc. 84-4-000003	718.06-718.45, 720.10-720.18, 715.06 or 715.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.20 Various rates	Balfont Sales Corp. v. Quarts analing watches, etc. Instruments, Inc. v. U.S. 673 F.2d 1413 (1982)
C90/241 7/27/90 Aquillino, J.	Casio, Inc. 84-6-01227	718.06-718.45, 720.10-720.18, 715.06 or 715.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.20 Various rates	Balfont Sales Corp. v. Quarts analing watches, etc. Instruments, Inc. v. U.S. 673 F.2d 1413 (1982)
C90/242 7/27/90 Aquillino, J.	Casio, Inc. 86-1-000448	718.06-718.45, 720.10-720.18, 715.06 or 715.15 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 676.20 Various rates	Balfont Sales Corp. v. Quarts analing watches, etc. Instruments, Inc. v. U.S. 673 F.2d 1413 (1982)



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